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No. 108, Original

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

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STATE OF NEBRASKA,

*Plaintiff,*

v.

STATE OF WYOMING, *et al.*,

*Defendants.*

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**OWEN OLPIN, SPECIAL MASTER**

**FIRST INTERIM REPORT**

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**June 14, 1989**

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## I. INTRODUCTION.

The waters of the North Platte River were apportioned by decree in 1945, after eleven years of litigation involving the States of Colorado, Wyoming and Nebraska and the United States. *Nebraska v. Wyoming*, 325 U.S. 589, 605-06 (1945), *modified*, 345 U.S. 981 (1953), 108 S. Ct. 1103 (1988) ("the Decree"). The heart of that controversy was whether upstream junior appropriators in Wyoming and Colorado were wrongfully depriving senior appropriators in Nebraska of North Platte waters. The Decree generally restricts prospectively developments inhibiting established water uses on the river. Significantly, the Decree recognizes some priorities across state lines, protects established Wyoming and Nebraska uses against certain further Colorado developments, Decree ¶ I, and in turn protects established Nebraska uses against certain further Wyoming developments. *Id.* ¶¶ II, IV.

The Decree's polestar is its allocation of waters in the North Platte mainstem between Guernsey Dam (in Wyoming) and the Tri-State Diversion Dam (just downstream of the Wyoming-Nebraska state line). During the May 1 through September 30 irrigation season, all natural flows in this region of the mainstem are apportioned 75% to Nebraska and 25% to Wyoming. *Id.* ¶ V.

The Decree also contains a "changed conditions" or "reopener" clause. *Id.* ¶ XIII. The Court retains jurisdiction for the purpose of any "order, direction, or modification" of the Decree. The Decree offers changed conditions, *id.* ¶ XIII(f), threatened construction in Wyoming, *id.* ¶ XIII(c), or threatened construction in Nebraska, *id.* ¶ XIII(b), as illustrative of events which might give rise to an "order, direction, or modification."

On October 6, 1986, Nebraska petitioned the Court to enforce the Decree and for injunctive relief. In her petition, Nebraska alleged that Wyoming unlawfully is depleting and threatening to deplete the flows of the North Platte River (i) by her intended administration of the operation of and releases from the Grayrocks Reservoir on the Laramie River, a tributary of the North Platte River, (ii) by her intended construction of additional river pumping, diversion and storage facilities near the confluence of the Laramie and North Platte Rivers, (iii) by her proposed construction of a storage reservoir on Deer Creek, a tributary entering the North Platte River between Pathfinder and Guernsey Reservoir, and (iv) by her efforts to "prevent the United States Bureau of Reclamation's continued diversion of North Platte waters in Wyoming through the Interstate Canal for storage in the Inland Lakes in Nebraska for the benefit of water users in the State of Nebraska."[1]

In answering Nebraska's petition Wyoming filed a counterclaim alleging that Nebraska is circumventing the

[1] Petition For An Order Enforcing Decree And For Injunctive Relief ¶ 3 (Oct. 6, 1986) ("Nebraska's Petition").



Decree by (i) demanding natural flow water for diversion by irrigation canals at and above Tri-State Dam in excess of the irrigation requirements of lands entitled to water under the Decree and (ii) demanding both natural flow and storage water from sources above Tri-State Dam and bypassing or diverting it to uses below the dam that are not recognized or authorized by the Decree.[2]

On January 11, 1988, Nebraska moved the Court to amend her petition for the principal purpose of enforcing the Decree, and modifying the Decree if necessary, to protect instream uses of the North Platte River and its tributaries. Nebraska noted that:

> Encouraged and sanctioned by the passage of federal and state legislation since the entry of the Decree in 1945, the principal instream use of the waters of the North Platte and its tributaries has been for the development and protection of critical wildlife habitat.[3]

The Court denied, without explanation, Nebraska's motion to amend.[4]

On June 22, 1987, the Supreme Court referred this matter to me as Special Master in an order stating:

> It is ordered that Owen Olpin, Esquire, of Los Angeles, California be appointed Special Master in this case with authority to fix the time and condi-

[2] Wyoming Answer To Petition, Motion For Leave To File Counterclaim And Counterclaim (Mar. 18, 1987) ("Wyoming Answer And Counterclaim") at 8-9.

[3] Brief In Support Of Motion To Amend Petition For An Order Enforcing Decree And For Injunctive Relief (Jan. 11, 1988) ("Nebraska Brief To Amend") at 2.

[4] *Nebraska v. Wyoming*, 108 S. Ct. 1103 (1988)

> The motion of Basin Electric to file a response to plaintiff's motion to amend is granted. The motion of plaintiff to amend petition for an order enforcing decree and for injunctive relief is denied.

> tions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The order also referred to me then-pending motions for intervention. This First Interim Report is submitted to the Supreme Court to describe my interpretation of my authority and my exercise of that authority in these proceedings to date. I have thus far ruled on the motions for intervention and on Wyoming's motion for summary judgment and certain related motions to strike.

## II. SCOPE OF AUTHORITY.

Nebraska petitioned to enforce the Decree. Wyoming and *amicus* Basin Electric have contended that, because the matter arose in this manner, my authority is limited. They have repeatedly challenged the exercise of my authority on the basis that this is an enforcement proceeding that can and should be decided on the face of the Decree.[5] Although the Order of Reference expressly gives me "authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and

[5] *See, e.g.*, Wyoming Reply Brief In Support Of Motion For Summary Judgment And Wyoming Motion To Strike Affidavits (Sept. 19, 1988) ("Wyoming Reply And Motion To Strike") at 4 (the Special Master "should not allow 'enforce' to be transformed into 'modify' via 'clarification' or 'construction,' and should not permit the issues to be expanded beyond the limited scope of this enforcement proceeding."); Wyoming Motion And Supporting Memorandum Requesting Reconsideration Of Special Master's Tenth Memorandum And Order Denying Summary Judgment (Mar. 29, 1989) ("Wyoming Reconsideration Motion") at 3, *id.* at 5 ("The Special Master apparently assumes that the Court, by appointing a Special Master, expressed its intent to require evidentiary hearings on every issue. Such an assumption is not justified. . . . No trial is necessary to interpret the Court's previous opinion and Decree and to determine the scope of this case.").



such as [I] . . . may deem it neessary to call for," it has been suggested that my decision to take evidence would be beyond the scope of this proceeding:

> [T]o the extent 'facts' in the record are needed to explain ambiguities in the Decree, the opinion, or the Master's Report, the record is available and relevant portions have been pointed out by the parties. . . . Even if the Master determines that he needs to consider additional portions of the record before deciding the summary judgment motion, no trial regarding the record would be necessary or appropriate.[6]

In opposing Nebraska's petition, Wyoming has argued in her summary judgment pleadings, during oral argument, and again in her petition for reconsideration that as a matter of law the Decree is not violated by Wyoming's actions and proposed actions that are the subject of this action. These arguments have been evaluated and rejected both by the Court when it took jurisdiction despite such assertions, and by me in denying summary judgment after a review of the original special master's report and record leading to the 1945 Decree and evidence put into this record by Nebraska and the United States.[7]

I continue to interpret my authority as permitting me to take evidence "on all of the substantive questions that

[6] Wyoming Reply And Motion To Strike at 15. *See also* Basin Electric's Reply Memorandum In Support Of Its Petition For Reconsideration Of Its Motion To Intervene And Of Parts Of The Master's Tenth Memorandum (Mar. 29, 1989) at 5-6 ("Nebraska's confident assertion that the Master is authorized to take evidence in aid of construing the decrees IS DEAD WRONG. A decree must be interpreted solely by reference to its terms and to the record on which it is based. Evidence *dehors* the record from which the decree proceeded is incompetent to establish its meaning.").

[7] In my Tenth Memorandum And Order (Mar. 2, 1989) ("Tenth Memorandum") denying summary judgment, I left open the possibility of summary disposition if later discovery and pretrial proceedings suggest further factual development to be unnecessary.

the Court has permitted Nebraska to litigate, and, upon consideration of such evidence, to fashion appropriate recommendations for the Court's consideration of all the possible varieties that were contemplated by the Court in its opinion and in the Decree, including Paragraph XIII." [8]

## III. THE MOTIONS FOR INTERVENTION.

The Court's June 22, 1987 Order of Reference specifically referred to me five pending motions for leave to intervene in this matter.[9]

All the motions to intervene were opposed. The intervention issues were fully aired in three rounds of briefing, in oral presentation at a status conference in Salt Lake City, Utah, on October 1, 1987, and during the course of telephone conferences held among the parties and the putative intervenors. For the reasons described below, on April 1, 1988, I denied the motions to intervene, but invited all of the putative intervenors to participate in this action as *amici curiae*. I provided for active involvement in the case by the *amici*, allowing them to present affidavits, file briefs, including reply briefs, as well as the potential to participate more fully respecting key matters in the proceedings upon a showing of good cause. I envisioned the *amici* participating both to preserve their interests and as traditional friends of the court to aid in full exposition of the issues.

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[8] Tenth Memorandum at 5. Paragraph XIII of the Decree states in relevant part:

> XIII. Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

[9] The United States, as an intervenor in the proceedings leading to the 1945 Order and Decree, *Nebraska v. Wyoming*, 325 U.S. 589 (1945), has remained a party to this case.



Bearing in mind that original actions are clothed in a mantle of flexible procedure,[10] while I saw Fed. R. Civ. P. 24 as lending structure to the intervention analysis in this original action, I sought applicable standards in the precedents of other original actions.

Original jurisdiction "should be invoked sparingly." *Utah v. United States*, 394 U.S. 89, 95 (1969) (per curiam). A private party ordinarily has "no right to intervene in an original action," *United States v. Nevada*, 412 U.S. 534, 538 (1973) (per curiam), but may be permitted to intervene if it can satisfy the "burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *New Jersey v. New York*, 345 U.S. 369, 373 (1953). *See also Kentucky v. Indiana*, 281 U.S. 163, 173 (1930). Further, the adjudication at hand must, in practice, adjudicate rights belonging to the intervenor, *Texas v. New Jersey*, 379 U.S. 674, 677 n.6 (1965), and have a *res judicata* effect with respect to those interests.

I also considered policy questions including fairness to non-parties, protection of interests that will be affected by principles of *stare decisis*, collateral estoppel and *res judicata*, full exposition of the issues, and promotion of judicial economy. I balanced these considerations against the need to prevent unnecessary expansion of the scope of the action, to avoid confusion, delay and inefficient administration of justice, and to protect the parties to the action against the prejudice and additional litigation obligations (*e.g.*, discovery, experts and evidence gathering) that might be caused by adding intervenors.[11]

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[10] *See, e.g., Grayson v. Virginia*, 3 U.S. 319 (3 Dall. 320) (1796); *California v. Southern Pacific Co.*, 157 U.S. 229, 249 (1895).

[11] *See* Fed. R. Civ. P. 24(b); 3B J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶24.10[4] (2d ed. 1987).

Although each of the potential intervenors articulated keen interest in the outcome of the case at hand, I concluded that their interests either could be represented by a current party or would not be adjudicated in this proceeding. To the extent that the case might have some impact on the eventual disposition of their interests, I thought it fitting that the *amici* should work closely with the parties to ensure full exposition of the necessary evidence and examination and availability of important witnesses.

**A. The Platte River Trust and the National Audubon Society.**

Certain reaches of the North Platte River in Nebraska are seasonal habitat for several endangered species of wildlife, including the whooping crane. The Platte River Whooping Crane Critical Habitat Maintenance Trust ("Platte River Trust") was established in 1978 by the Basin Electric Power Cooperative, Inc., as part of a settlement of litigation over the construction of the Grayrocks Dam in Wyoming. The Platte River Trust has a mandate to "protect and maintain . . . the physical, hydrological and biological integrity of [the Platte River] area so that it may continue to function as a life-support system" for migratory bird species.

The Platte River Trust and the National Audubon Society ("Audubon") both requested intervention "to protect and enhance the habitat of migratory birds" [12] by ensuring that there are no "further decreases or regula-

[12] Motion Of Platte River Trust For Leave To Intervene As Plaintiff And Memorandum In Support Of Motion And Complaint In Intervention (Mar. 20, 1987) ("Platte Memorandum") at 10. *See also* Motion Of The National Audubon Society For Leave To Intervene Or To Participate As Litigating Amicus Curiae And Brief In Support Of Motion For Leave To Intervene Or To Participate As Litigating Amicus Curiae (Mar. 23, 1987) ("Audubon Motion") at 3-4.



tion of the natural flow" [13] of the North Platte River to the Big Bend reach and that restrictions are imposed on seasonal variation in the North Platte flow at the Wyoming-Nebraska state line.[14] According to the Platte River Trust and Audubon, "[w]ithout a satisfactory pattern of river flows, the habitat . . . will be permanently destroyed," and the apportionment in this case will "have a significant precedential and practical effect upon . . . future ability to pursue regulatory or statutory water rights within or outside the State of Nebraska." [15]

The Platte River Trust and Audubon believe that their interests will not be represented adequately by either the United States [16] or Nebraska.[17] Nebraska, Wyoming and Colorado opposed intervention by the Platte River Trust and Audubon on the grounds that their intervention would enlarge the scope of these original jurisdiction proceedings and that there are other more appropriate forums in which to protect environmental interests. Also, it was argued, Nebraska and the United States could represent those interests.[18]

[13] Audubon Motion at 4.

[14] Platte Memorandum at 10.

[15] *Id.; see also* Audubon Motion at 8-9.

[16] Telephone Conference Transcript of Proceedings (Nov. 4, 1987) ("Tel. Cf. Tr.") at 8.

[17] *Id , see also* Transcript of Proceedings (Oct. 1, 1987) ("Salt Lake Tr.") at 66, 80, 83.

[18] Putative intervenors Nebraska Public Power District and the Central Nebraska Public Power and Irrigation District also argued that intervention by the Platte River Trust and Audubon would expand the scope of the proceedings. *See* Joint Motion Of Nebraska Public Power District And The Central Nebraska Public Power And Irrigation District For Leave To File A Joint Complaint In Intervention And For Leave To Intervene As Plaintiff, Joint Complaint In Intervention, And Brief In Support Of Joint Motion For Leave To File A Joint Complaint In Intervention And For Leave To Intervene As Plaintiffs (Apr. 15, 1987) ("Nebraska Districts Joint Brief") at 20-21.

At that stage in the proceedings, I determined that it did not appear that enforcement of the Decree would *directly* require detailed resolution of the wildlife and environmental issues. Thus, adding the Platte River Trust and Audubon as intervenors unnecessarily could expand the factual issues to be developed. However, I made clear that while decisions concerning appropriations within Nebraska, Wyoming, and Colorado and the protection of wildlife and enivronmental issues primarily belonged in other forums, the resolution of the issues in this case could affect future actions in those forums.

The United States is charged by numerous federal statutes with the responsibility to protect wildlife and environmental values. Although it represents other federal agencies which may have other and sometimes competing interests, the United States has the duty to assess the necessary balance between the various federal concerns. Mr. Andrew Walch, speaking for the United States, recognized downstream wildlife issues[19] and put the United States on record as having the intention to represent these interests:

> We're not asserting any claims or rights at this time in regards to those [wildlife and environmental] matters, but *we will be very diligent*, I think, in presenting evidence and in considering the evidence presented by the parties relative to any potential impacts that a modification or substantial change in the decree might have on those interests. In that regard, I think that since the United States is charged with some responsibilities for endangered species, that the concerns raised by National Aud[u]bon and the Trust will, at least to the best of our ability, be represented in this proceeding[] if we do recognize some threat to those interests.[20]

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[19] *Id.* at 14-16.

[20] Salt Lake Tr. at 53, 54 (emphasis added). *See also id.* at 111-115; Tel. Cf. Tr. at 24 ("We still think that we can represent all of the interests of the United States in this proceeding.").



I encouraged the United States to cooperate with the Platte River Trust and Audubon in this regard.

The Platte River Trust and the National Audubon Society have continued actively to participate as *amici*, filing briefs, presenting affidavits and appearing at hearings.

**B. Basin Electric Power Cooperative.**

Basin Electric Power Cooperative ("Basin Electric") is concerned about Nebraska's claims that Wyoming is or would be violating the Decree with respect to her activities or proposed activities at Grayrocks, the Laramie River Station and the Corn Creek Irrigation District. Basin Electric believes that Wyoming cannot adequately represent its interests because Wyoming was not a party to the Settlement Agreement which was the product of earlier Grayrocks litigation between Nebraska, the National Wildlife Federation, Audubon and others on the one hand, and the Rural Electrification Administration, the Omaha District Engineer of the U.S. Army Corps of Engineers and others on the other hand, and because Wyoming might not accord priority to Basin Electric's interests.[21] Wyoming opposed intervention by Basin Electric on the basis of her *parens patriae* role in equitable apportionment proceedings.[22]

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[21] Motion Of Basin Electric Power Cooperative For Leave To Intervene And Memorandum In Support Of Motion And Answer (April. 13, 1987) ("Basin Memorandum") at 8-9; Salt Lake Tr. at 89-92. Basin Electric also does not believe that the United States can or will represent its interests. *Id.*

[22] Wyoming Memorandum In Opposition To Basin Electric Power Cooperative Motion For Leave To Intervene (Apr. 14, 1987) at 2; *see also* Salt Lake Tr. 42-43 ("Basin's and the State of Wyoming's position are [sic] the same, and that is the Laramie River is exempt from apportionment in the decree.").

I concluded that Basin Electric had not shown a compelling interest in its own right that would not be properly represented by Wyoming.[23] To the extent that Basin Electric has raised issues with respect to Grayrocks and the Laramie River that would be resolved in this case, Wyoming was deemed to represent those interests after declaring herself ready and equipped to do so:

> MR. COOK [Wyoming]: Wyoming has said . . . that as a Wyoming appropriator [Basin] would be administered according to Wyoming water law in priority with other water users, and that is in essence . . . the only position Wyoming can take with Basin. We wanted to defend their water right and defend their ability to use the Laramie River . . . Wyoming intends to regulate and administer water for Basin in priority.[24]

I did, however, see Basin Electric playing a useful role as an *amicus*, both to ensure that Wyoming adequately protects Basin Electric's interests, and to flesh out fully the necessary data for the Court. Indeed, Basin Electric has participated actively in the proceedings to date, filing briefs and appearing at hearings.

On March 29, 1989, Basin Electric petitioned for reconsideration of its motion for leave to intervene or, in

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[23] I saw Basin's position as comparable to that of the City of Philadelphia in *New Jersey v. New York*, 345 U.S. 369 (1953). The Supreme Court denied the right of intervention to Philadelphia, which asserted unquestioned interest in the use of the Delaware River's water at issue and pointed to its recent grant of Home Rule as justification for its independent participation, on the grounds that the state must be deemed to represent all of its citizens in an original case or "there would be no practical limitations on the number of citizens . . . to be made parties," expanding original actions "to the dimensions of ordinary class actions." *Id.* at 373.

[24] Salt Lake Tr. at 128-29.



the alternative, renewed its prior motion to intervene.[25] This reconsideration request arose out of the position taken by Wyoming during oral argument on Wyoming's motion for summary judgment. Wyoming made clear that, while she intends to administer water released from Grayrocks in compliance with Wyoming law, she does not guarantee that such administration will be consistent with the terms of the Settlement Agreement. *See infra*, pp. 10a-11a. Basin Electric now argues that Wyoming patently cannot be deemed to represent her interests because "Wyoming does not regard Basin's obligation to maintain minimum flows as provided in the Settlement Agreement as being entitled to recognition under Wyoming law." [26]

I have deferred a ruling on Basin's petition for reconsideration or renewal of its intervention motion until Wyoming's position with respect to the minimum flows required by the Settlement Agreement can be firmly established during pretrial proceedings.

**C. The Nebraska Districts.**

The Nebraska Public Power District and the Central Nebraska Public Power and Irrigation District (collectively the "Nebraska Districts") moved to intervene, arguing that as downstream users they would be directly affected by the resolution of the issues raised by Nebraska in her original petition.[27] Further, "the States cannot adequately represent the Districts' interests because the States are not a licensee. The States have certainly a

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[25] Petition Of Basin Electric Power Cooperative For Reconsideration Of Its Motion For Leave To Intervene And Of Certain Parts Of The Decision Contained In The Tenth Memorandum Of The Special Master (Mar. 29, 1989) ("Basin Electric Petition For Reconsideration").

[26] Basin Electric Petition For Reconsideration at 5.

[27] Tel. Cf. Tr. at 8.

broader and a different perhaps set of interests." [28] Wyoming opposed intervention by the Nebraska Districts.[29]

I denied intervention to the Nebraska Districts because issues concerning their status and responsibilities as FERC licensees would not be part of this proceeding. With respect to other issues, Nebraska would adequately represent their interests.

Since my denial of their intervention motions, the Nebraska Districts have played no role in this case although I extended to them the opportunity to participate as *amici*.

## IV. WYOMING'S MOTION FOR SUMMARY JUDGMENT.

On September 11, 1987, Wyoming moved for summary judgment on all the questions raised by Nebraska's October 6, 1986 petition to enforce the Decree. *See supra* at 2.

Wyoming, in answering Nebraska's petition and filing a counterclaim, took the position that Wyoming has the right to dewater the Laramie River up to its confluence with the North Platte River leaving Nebraska no rights in the Laramie, which Wyoming contends was earlier fully apportioned between Wyoming and Colorado. Further, Wyoming took the position that the Decree on its face precludes a finding that the operation of the Deer Creek Reservoir would violate the Decree. Finally, Wyoming argued that her suit against the United States Bureau of Reclamation to require Bureau compliance with Wyoming law with respect to storage of water in the Inland Lakes does not violate the Decree.

After the Court granted leave to Nebraska and appointed me as Special Master, Wyoming moved for summary judgment raising essentially identical arguments.

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[28] *Id.*

[29] *Id.* at 14-16.



In her summary judgment motion Wyoming acknowledged that Nebraska accurately described Wyoming's proposed developments on the North Platte River and its tributaries and conceded effects on the North Platte flows. Wyoming contended, nevertheless, that there were no genuine issues of material fact and that the legal issues could be resolved through facial interpretation of the Decree.[30]

Both the United States, which intervened in the 1945 proceedings and is a party in this case,[31] and Nebraska opposed the motion for summary judgment. The Platte River Trust, as *amicus curiae*, also opposed the motion for summary judgment to the extent the State of Wyoming argued that Nebraska's rights are limited, as a matter of law, to water requirements for lands served by canals diverting at or above the Tri-State Dam in Nebraska just downstream of the Wyoming line. *Amicus* Basin Electric supported Wyoming's motion for summary judgment.

The issues raised by the summary judgment motion were fully litigated in a round of briefing, in oral argument at a day-long hearing in Pasadena, California, on November 18, 1988, and in follow-up affidavits and correspondence, and examined in light of a review of the report of Special Master Doherty and the record in the previous proceedings during the 1930's and 1940's. *Amici* the Platte River Trust and Basin Electric participated in the oral argument.

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[30] Motion Of The State Of Wyoming For Summary Judgment And Brief In Support Of Motion at 81 (Sept. 11, 1987) ("Wyoming Summary Judgment Motion").

[31] Colorado was impleaded as a defendant in the 1945 proceedings, but did not participate in the summary judgment proceedings until the time came to file petitions for reconsideration of my ruling. However, Colorado has been served with all papers and has the ability to participate in any part of these proceedings.

For the reasons described below, I denied Wyoming's motion for summary judgment. I found with respect to each of the issues I considered that there are outstanding genuine issues of material fact. In short, there are factual issues to be explored before a fair adjudication can be reached and, given the crucial importance of these questions to the people of Nebraska, Wyoming and Colorado, and to the United States, I intend to proceed to trial of all of the disputed issues.

Wyoming also filed a counterclaim and, in conjunction with the summary judgment motion, requested a ruling on a question of law implicated in her counterclaim: in the context of this action, can Nebraska assert any claim to North Platte waters other than for irrigation of lands served by canals that divert at or above Tri-State Dam (including the Ramshorn Canal)? For reasons described below, I left this question open for further factual development.

According to an appeal procedure that I set forth in my ruling on summary judgment, Wyoming, Colorado and Basin Electric have all petitioned for reconsideration of portions of that ruling.[32] In addition, the United States has suggested that I should narrow the issue I framed with respect to the downstream of Tri-State reach.[33] The United States agrees, however, that summary adjudication at this time is inappropriate even on its suggested narrower issue.[34]

At a status conference held in Pasadena, California, on May 12, 1989, the parties agreed to proceed with pre-

[32] Wyoming Reconsideration Motion; Colorado Petition For Reconsideration (Mar. 29, 1989); Basin Electric Petition For Reconsideration.

[33] Response Of The United States To Motions For Reconsideration Of Wyoming, Colorado And Basin Electric (Apr. 21, 1989) ("U.S. Response To Motions For Reconsideration") at 3-4.

[34] *Id.* at 4.



trial preparation on two issues that have not been expressly challenged, the decisiton to determine in this forum the Inland Lakes water storage rights claimed by the United States and disputed by Wyoming, and the question whether Wyoming's contemplated development and administration of the Deer Creek project threatens to violate the Decree. Wyoming, Colorado and Basin Electric have all petitioned for reconsideration of my decision to allow Nebraska to proceed to show injuries she claims to equities below the Tri-State Dam instead of ruling as a matter of law that the 1945 Decree affords Nebraska no rights to relief for any injuries to any uses other than those irrigation uses initially supplied by diversions into canals at or above Tri-State Dam. Wyoming and Basin Electric have also challenged my finding that outstanding issues of material fact preclude summary judgment on the issues related to the Laramie River.[35] I have denied the petitions for reconsideration for the reasons described below.

In considering Wyoming's motion for summary judgment, I found that the Rule 56 standards have not been satisfied.[36] I left open the possibility of summary ad-

[35] During the summary judgment proceedings, Wyoming also moved to strike affidavits and portions of affidavits submitted by those expected to be expert witnesses for Nebraska, the United States and the Platte River Trust. With one exception I denied Wyoming's motion to strike, finding the challenged evidence to be consistent with what is expected under Fed. R. Civ. P. 56(e) and Wyoming's motion to be hypertechnical. My ruling on the motion to strike has not been challenged.

[36] Wyoming asked that the factual development of this case be cut off on the basis that Nebraska and the United States have not presented testimony that would justify taking the matter to trial. Under Rule 56(c), summary judgment would be appropriate if, upon weighing the pleadings, affidavits, and other materials placed before me it is apparent that there is no genuine issue of material fact that should be left for further consideration at trial. Fed. R. Civ. P. 56(c). Rule 56 is a useful source of guidance but is tempered by the context of this original action. *See* S. Ct. R. 9.2;

judication on any issue later in the proceedings. I was mindful of the need for original jurisdiction cases to permit full development of the facts. *United States v. Texas*, 339 U.S. 707, 715, *modified* (for textual accuracy), 340 U.S. 848 (1950). I inferred from the Supreme Court's granting of jurisdiction and referral of the matter to me that the Court had already taken into consideration the sufficiency of Nebraska's allegations. *Cf. California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 278 (1982) (no special master appointed because "[n]o essential facts" were disputed); *South Carolina v. Katzenbach*, 383 U.S. 301, 307 (1966) (the Court dispensed with the appointment of a special master "[b]ecause no issues of fact were raised in the complaint"); *United States v. Texas*, 339 U.S. at 715 (no master was needed to resolve factual problems).

Finally, I took notice of the identity of arguments contained in Wyoming's opposition to Nebraska's initial petition for leave to file and her arguments in her summary judgment motion. The Court had already reviewed and considered the arguments later made by Wyoming in her summary judgment motion, but nonetheless took jurisdiction and referred the matter to me. Wyoming has raised no new issues in her petition for reconsideration of my denial of summary judgment. I explain below my reasons for denial of summary judgment concerning the issues in the case as to which there is a dispute.

**A. The Inland Lakes Issues.**

There have been no express challenges in the reconsideration papers to my determination that the questions raised about the Inland Lakes should be litigated in this forum as part of these proceedings and that those questions presently are not appropriately resolved by summary judgment.

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R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 10.12, at 495-96 (6th ed. 1986); *Ohio v. Kentucky*, 410 U.S. 641, 644 (1973).



In 1986, Wyoming brought a lawsuit against the United States Bureau of Reclamation in the United States District Court for Wyoming ("Christopulos Suit") to require the Bureau of Reclamation to obtain a permit for the diversion of storage waters to the Inland Lakes during the non-irrigation season. In her petition to the Supreme Court, Nebraska alleged that Wyoming state officials were taking certain actions to prevent the diversion of storage waters to the Inland Lakes during the non-irrigation season.[37] Wyoming correctly interpreted this allegation as a reference to her Christopulos Suit and argued that the Court should rule summarily "as a matter of law that the Wyoming lawsuit does not violate the Decree."[38] Wyoming has repeatedly insisted that the merits of the Inland Lakes issue are not the subject of the instant proceeding.[39] As Nebraska has pointed out, however, it is "not the suit 'itself' which would violate the Decree, but the relief requested by Wyoming" in the suit.[40]

Despite the initial obfuscation of the issue involved with respect to the Inland Lakes, the parties now agree on the key question to be tried. That question is whether the Inland Lakes enjoy a water priority date under Wyoming law of December 6, 1904, and certain water rights for their historical administration under the Decree, and,

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[37] Nebraska's Petition ¶ 3(d).

[38] Wyoming Summary Judgment Motion at 102-103; *see also id.* at 98-99; Wyoming Reply And Motion to Strike at 33.

[39] *Id.*; *see also* Hearing For Summary Judgment (Nov. 18, 1988) ("Summary Judgment Tr.") at 47, 160.

[40] Nebraska's Response To Wyoming's Motion For Summary Judgment (Aug. 22, 1988) ("Nebraska's Response") at 52; *see* Nebraska's Petition ¶ 3(d); *see also* Response Of The United States To Wyoming's Motion For Summary Judgment (Aug. 22, 1988) ("U.S. Response") at 47. Nebraska was unequivocal in framing the issue in her petition.

if so, whether the Christopulos Suit is an attempt to circumvent the Court's apportionment in the 1945 Decree through the authority of a lower court decree to which Nebraska is not a party.[41]

In her answer Wyoming argued that the Inland Lakes question was a matter of state, not federal, law, and that the Supreme Court should await the outcome of the Christopulos Suit. In her motion for summary judgment Wyoming again argued that the questions "whether the Bureau [of Reclamation] has proceeded in conformity with Wyoming law and, if not, what it must do to comply with Wyoming law" are state law questions.[42] However, as the Court implicitly acknowledged by accepting jurisdiction of the Inland Lakes questions, this is the appropriate forum, because the Inland Lakes questions are inextricably entwined with the 1945 Decree and its injunctions and with the historic manner in which the North Platte Project has been operated. Also, because the Inland Lakes store water for uses in Nebraska, Nebraska properly must be before a court resolving these issues.[43]

Therefore, I have concluded that the parties should develop the relevant evidence and litigate these questions during these proceedings. During the May 12, 1989 status conference in Pasadena, the parties reached consensus on this manner of proceeding and will be filing discovery

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[41] The Wyoming lawsuit against the United States Bureau of Reclamation in the United States District Court for Wyoming is captioned *Wyoming ex rel. Christopulos v. United States*, No. 23-13 (Wyo. Dist. Ct. filed Oct. 3, 1986) (removed to U.S. District Court for the District of Wyoming, Case No. C86-0370-B). Nebraska is not a party to the Christopulos Suit.

[42] Wyoming Summary Judgment Motion at 100.

[43] *See* U.S. Response at 49.



memoranda on the Inland Lakes issues by June 30, 1989.[44]

The factual briefings by the parties thus far suggest that Wyoming faces a daunting burden with respect to her Inland Lakes position, but she will be given the opportunity to sustain that burden during these proceedings.[45] When I probed Wyoming about the nature of her potential evidence during the May 12, 1989 Pasadena status conference, it became apparent that at trial Wyoming will rely upon negative evidence—that she has found nothing in the state water records to establish categorically a priority date of 1904:

> THE COURT: So am I getting to the point where, Mr. Cook, you really don't have much in the way of evidence but rather it will be mostly an attack on the basis claimed by the United States for a 1904 right?
>
> MR. COOK [Wyoming]: Essentially, that is correct. But then you need to be able to rebut the evidence that I hear that there is only one status quo in how this system has been administered over time, and that's a matter of disagreement.[46]

The attached Appendix A describes the North Platte Project and the parties' factual showings thus far respecting the Inland Lakes.

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[44] Wyoming has indicated that she is prepared to proceed now on this issue:

> MR. COOK [Wyoming]: . . . Wyoming would like to move ahead with the Inland Lakes issue. We believe it is separate. Our position in this Court has not been to avoid attacking these issues. It has been a question of for[u]m, and you decided this is the for[u]m to have that discussion.

Pasadena Transcript (May 12, 1989) ("Pasadena Tr.") at 12.

[45] Indeed, the United States believes that summary judgment should be granted now in favor of Nebraska and the United States that the Inland Lakes enjoy a 1904 priority right. Summary Judgment Tr. at 141-42.

[46] Pasadena Tr. at 39.

**B. Tributary Issues.**

Wyoming's summary judgment motion raises issues respecting two tributaries, Deer Creek, entering the North Platte between Pathfinder and Guernsey Reservoir, and the Laramie River, joining the North Platte in the critical reach between Whalen, Wyoming and the Tri-State Dam. The Deer Creek issues implicate specific language in the Decree that purports to apply generically to tributaries between Pathfinder and Guernsey and language that makes special provision for ordinary and usual domestic, municipal and stock watering purposes and consumption. In the case of the Laramie the concern is with language in the Decree, the Court's opinion, and the record that singles out the Laramie for particularized treatment which Wyoming now interprets as entirely excluding all Laramie flows from consideration in the apportionment effected by the Decree.

For the reasons explained in the following sections I have denied Wyoming's motion for summary judgment on the Deer Creek and Laramie issues and have also denied her motion for reconsideration. In the case of both tributaries I have left open the prospect of future summary adjudication in these proceedings.

The ensuing sections first address the issues implicating the Laramie River and then Deer Creek.

**1. *The Laramie River.***

The Laramie River is a tributary which enters the North Platte River in its most critical reach between Whalen, Wyoming and the Tri-State Dam. Special Master Doherty underscored the great importance of this reach:

> [The Whalen to Tri-State section] is the pivotal section of the entire [North Platte] river. Here is focused the main problem of water distribution. In this short 43-mile span there is concentrated a demand for water as great as the entire preceding 415 miles . . . from the interior of North Park [in northern Colorado headwaters] to Whalen.



Report of Michael J. Doherty, Special Master (Sept. 1944) ("Doherty Report") at 53.

Wyoming argued in her opposition to Nebraska's petition for leave to file, in her motion for summary judgment, and again in her motion for reconsideration that summary judgment is appropriate, adopting her contention that the Laramie River was previously fully apportioned between Colorado and Wyoming.[47] This contention is based on a reference in the Decree to the apportionment of Laramie waters between Colorado and Wyoming in the several decisions in *Wyoming v. Colorado* and a similar reference in the decision in *Nebraska v. Wyoming*, 325 U.S. 589, 592 n.1 (1945). I have acknowledged that these references could, if accepted uncritically at face value, be interpreted to apportion all Laramie River flows between Colorado and Wyoming, leaving no room for any claims to Laramie flows beyond its confluence with the North Platte.

However, as I detailed in my ruling denying summary judgment, I found sufficient material factual issues to foreclose such an uncritical interpretation at this juncture and to require the taking of evidence on the Laramie. Most importantly, I found that Special Master Doherty apparently relied on Laramie inflows in fashioning the 1945 Decree and that those inflows have been counted in the 75/25 apportionment of the natural flow in the Whalen to Tri-State reach since the Decree. On the basis of these facts alone, I am unable to rule for Wyoming as a matter of law.

Nebraska and Wyoming have taken polar positions respecting the Laramie River, positions that cannot be harmonized. Wyoming posits that the Laramie's entire flow has been apportioned between Colorado and Wyoming and that the Decree permits Wyoming, therefore, to

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[47] Basin Electric has made similar arguments in both its motion for summary judgment and its petition for reconsideration.

dewater the Laramie anywhere down to its confluence with the North Platte, while conceding that any surviving Laramie flows actually reaching the confluence become subject to the Decree's 75/25 division of the natural flows during the irrigation season.[48] Nebraska contends, on the other hand, that the 1922 Supreme Court decree in the proceeding between Colorado and Wyoming ("Laramie Decree"),[49] apportioned the Laramie to the extent of Colorado's entitlement and Wyoming's "Laramie decree entitlement, that is, it[]s right to divert 272,000 acre feet for application on 181,500 acres of specified land down to and including Wheatland."[50] Any remaining flows of the Laramie, according to Nebraska, become part of the natural flow and are divided 75/25 by the 1945 Decree.[51] The United States guardedly endorses Nebraska's position.[52] All parties agree that once any Laramie waters actually enter the mainstem between Whalen and Tri-State they become subject to the natural flow division under the Decree and that the Decree has been so administered.[53]

I found that Wyoming has failed to carry her burden of showing that there is no genuine issue of material fact or to establish the legal grounds for her thesis that she may dewater the Laramie up to the confluence. A review of the original record compiled during the 1930's and 1940's in the proceedings leading to the Decree has failed to tie the knot on this inquiry. Despite some ex-

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[48] Summary Judgment Tr. at 22. *See also* Wyoming Reply And Motion To Strike at 18 ("Wyoming recognizes that the flows of the Laramie River reaching the North Platte River during the May 1 through September 30 irrigation season become a part of the water arriving in the Whalen to Tri-State section that is apportioned by the Decree."). Wyoming has argued, however, that the Decree apportioned the entire flow of the Laramie River between Colorado and Wyoming. A review of the record leading to the Decree does not confirm that the Decree disposed of the flows of the entire Laramie River. Indeed, the record fails to establish that either state sought a complete adjudication concerning the Laramie in 1945.

The record strongly suggests that Special Master Doherty did not intend to add content to the 1922 Laramie Decree ("Laramie Decree"). Doherty, finding little dispute on the Laramie question, failed to analyze the scope of the 1922 Decree in depth, simply stating that, while the 1922 Laramie Decree merely enjoined certain diversions by Colorado, "the underlying basis of the decree was in part the finding and assumption that the limitation upon Colorado's use would leave Wyoming 272,500 acre feet annually for the irrigation of 181,000 acres down to and including the Wheatland Project." Doherty Report at 269. Moreover:

> While Nebraska takes the position generally that not being a party to *Wyoming v. Colorado* it is not bound by the decree, the only specific point made in opposition to the distribution affected by the decree pertains to the Wheatland Project.
>
> . . .
>
> After reviewing the matter I am left in some uncertainty as to Nebraska's position respecting the Wheatland Project and the Laramie River in general. . . . *The other parties appear to take the view that the Laramie is removed from the present case by the decree in Wyoming v. Colorado, except for such contribution as the Laramie may make to the North Platte after any use by Colorado and Wyoming under the terms of that Decree.*

*Id.* at 269-71 (emphasis added).

Special Master Doherty included Laramie flows in his computation for the Whalen-Tri-State Dam Section from 1931-40. *See* Doherty Report at 67, Table III. *See also* Wyoming Exhibit 170; Record at 17528-39 (Special Master Doherty took evidence on natural and return flows below Wheatland.) Nothing has been found in the record to suggest that the Court intended Nebraska to be foreclosed from concerning herself about the continuation of the Laramie's historic contributions to the North Platte Project.

[49] *Wyoming v. Colorado*, 259 U.S. 419 (1922), *modified*, 260 U.S. 1 (1922), 286 U.S. 494 (1932), 298 U.S. 573 (1936), *vacated*, 353 U.S. 953 (1957).

[50] Summary Judgment Tr. at 94. In its brief, Nebraska argued that the 1922 Decree did not allocate the Laramie below Wheatland. Nebraska's Response at 28.

[51] Decree ¶ V.

[52] Summary Judgment Tr. at 144.

[53] *Id.* at 22 (Wyoming).

plicit language that facially is susceptible to a broad reading favoring Wyoming's position,[54] a review of the record and the Doherty Report has failed to reveal a clear intent on the part of either Special Master Doherty or the Court with respect to the determinations in the Laramie Decree. Nebraska, which was not party in the 1922 *Wyoming v. Colorado* case, did not, of course, litigate Nebraska's equities there, and the 1922 Court did not address the apportionment of the Laramie beyond the entitlement it accorded to the litigating states, Wyoming and Colorado, at that time. And the 1945 Decree merely validated the Laramie Decree as it stood and did not purport to change or amend it in any way.[55]

Because I did not find the answer to this question in the earlier record,[56] we should proceed to a trial on the operation of the Decree since 1945 and the question whether Wyoming can dewater the Laramie to the confluence of the North Platte under the Decree. I expect to examine the parties' practical construction of the Decree

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[54] *See, e.g.*, Doherty Report at 8 ("The water of the Laramie River was equitably distributed by the decision of this Court in the case of *Wyoming v. Colorado*, 259 U.S. 419, . . . and no redistribution of the waters of those rivers should be undertaken in this suit") (citation omitted); *Nebraska v. Wyoming*, 325 U.S. at 592 n.1 (1945) ("The waters of . . . the Laramie were previously apportioned . . . between Colorado and Wyoming by decree [and are] . . . in no way affected by the decree in this case.") (citation omitted).

[55] XII. This decree shall not affect:

. . .

(d) The apportionment heretofore made by this Court between the States of Wyoming and Colorado of the waters of the Laramie River, a tributary of the North Platte River.

Decree ¶ XII; *see Nebraska v. Wyoming*, 325 U.S. at 623-25.

[56] At trial, I expect to receive the assistance of the parties in sorting through and interpreting the original record. The parties have advised me of their intention to have the entire, voluminous original record retyped and made available to the parties and the Office of the Special Master. Attempts to scan the record have apparently proven unsuccessful.



as it has affected the Laramie, including metering activities, accounting procedures, and recording procedures. I will also examine Wyoming's historic and proposed future administration of waters released from the Grayrocks Reservoir and such other matters as seem appropriate.[57]

Nebraska and the United States have shown that Laramie flows have been included in daily flows. *See* Affidavit of J. Michael Jess (Aug. 15, 1988) ("Jess Aff.") ¶ 2 as amended; *Id.* at 4 (Graph); First Affidavit of David G. Wilde (Aug. 15, 1988) ("Wilde Aff. I") ¶¶ 52-56 (including Tables 7 and 8). I have concluded that I need additional factual development respecting any Nebraska equities tied to the remaining Laramie flows and that such factual development will be critical to the resolution of this question.

Nebraska posits that actions of Wyoming in two specific settings may affect Laramie flows to her detriment: the operation of Grayrocks Reservoir on the Laramie River mainstem northeast of Wheatland and the proposed construction of the Corn Creek Project as a diversion from near the confluence of the Laramie and North Platte Rivers for storage at an off-stream reservoir. The Grayrocks and Corn Creek circumstances are briefly described and commented upon in Appendices B and C.

### 2. *Deer Creek.*

The parties have not challenged expressly my denial of summary judgment on the Deer Creek issue in their reconsideration papers. At the status conference in Pasa-

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[57] Wyoming has argued strenuously, *see* Wyoming Reconsideration Motion at 4-5, and Basin Electric has echoed even more stridently, *see* Basin Electric Reconsideration Motion at 5-10, that it is not permissible to rely on evidence "*dehors* the record," such as the practical construction inherent in the administration of the Decree for more than four decades. I am not willing at this stage to rule out consideration of such evidence and will deal with that question when it concretely arises in these proceedings.

dena on May 12, 1989, it was agreed that a pre-trial conference will be held on the Deer Creek issues on September 12, 1989, and that discovery will proceed in the interim.

Deer Creek Reservoir is a storage project proposed to be built on a tributary entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir, downstream of Casper, Wyoming. It is sponsored by the Wyoming Water Development Commission. Affidavit of Michael K. Purcell ¶¶ 1, 2 (Sept. 2, 1987) ("Purcell Aff.") attached to Wyoming Sumary Judgment Motion. A Wyoming State permit was issued on March 13, 1987, for an appropriation of surface water for Deer Creek. Affidavit of Gordon W. Fassett (Sept. 2, 1987) ("Fassett Aff.") ¶ 2.

Wyoming states that the purpose of the Deer Creek Reservoir is to meet municipal needs in Casper, Wyoming, and other smaller municipalities in Wyoming below Alcova Reservoir but upstream of the mouth of Deer Creek by exchange. Purcell Aff. ¶ 4. Wyoming has stated that, "[u]ntil the full annual yield of Deer Creek Reservoir is needed for those municipal uses, the Commission plans to temporarily allow the water available in excess of the municipal needs to be used for non-municipal purposes." *Id.; see also* Motion Of The State Of Wyoming For Summary Judgment And Brief In Support Of Motion (Sept. 11, 1987) ("Wyoming Summary Judgment Motion") at 94 n.4.

Wyoming estimates that the Deer Creek Reservoir will store approximately 66,000 acre feet of water, yielding a "dependable annual yield for consumptive uses of . . . approximately 6,400 acre-feet to 9,600 acre-feet." Purcell Aff. ¶ 6. In December, 1987, the United States Army Corps of Engineers issued a permit under Section 404 of



the Federal Water Pollution Control Act, 33 U.S.C. § 1344 (1982), for Deer Creek Reservoir's construction.[58]

Wyoming contends that, as a matter of law, developing the Deer Creek Reservoir, although it "will result in certain depletions to the flow of the North Platte River,"[59] will not violate the Decree. Wyoming relies on Paragraph X of the Decree, which provides that the Decree "shall not affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado or Wyoming for ordinary and usual domestic, municipal and stock watering purposes and consumption." Decree ¶ X; *see* Wyoming Summary Judgment Motion at 98. I agree with Wyoming that the Decree does not affect purely ordinary and usual domestic, municipal and stock watering uses or diversions, but there are issues of fact to be resolved on whether the Deer Creek Project as presently contemplated is entirely within the Paragraph X exemption.

Wyoming also contends that no restrictions currently apply to tributary development and that, since Nebraska seeks only to "enforce" the earlier Decree, relief must be denied. *Id.* at 93; *see also* Wyoming Brief In Opposition To Motion For Leave To File Petition (Dec. 16, 1986) ("Wyoming Opposition Br.") at 19-21 (identical arguments).[60] The Court, however, expressly retained

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[58] Nebraska has challenged the issuance of the permit in federal district court in Nebraska. *Jess v. West*, Civ. No. 88-L-308 (D. Neb. filed Aug. 1, 1988); U.S. Response at 28.

[59] Wyoming Summary Judgment Motion at 90.

[60] In the proceedings leading to the 1945 Decree, the United States urged that the Court restrain development of the tributaries between Pathfinder Reservoir and Guernsey Reservoir. *Nebraska v. Wyoming*, 325 U.S. at 624-25. Special Master Doherty concluded that such regulation was then unnecessary, and the Court, finding no record evidence of a threat at that time to tributary inflows, agreed but retained jurisdiction specifically to address, among other things, the effect of the construction or threatened con-

jurisdiction for the purpose of examining "the effect of the construction or threatened construction of storage capacity not now existing on tributaries . . . between Pathfinder Reservoir and Guernsey Reservoir." Decree ¶ XIII(c). The United States and Nebraska have introduced evidence concerning the potential effects of the operation of Deer Creek on the Decree's equitable apportionment, making clear that there are outstanding issues of material fact in this regard.

I find that Nebraska has satisfied her burden of presenting sufficient facts to cast doubt upon Wyoming's contention that no genuine issues of material fact are involved. Both Nebraska and the United States have introduced evidence to show that the North Platte River breaks down into two parts at times of the year, with a new river arising downstream of Pathfinder Dam until the reservoir fills. The reservoirs downstream of Pathfinder, including the Inland Lakes, nonetheless can store water during such times largely because of tributary inflows. I found that, with this evidence of potential harm to her equities, Nebraska should have the opportunity to present her case in tandem with her case regarding Inland Lakes to attempt to show that Deer Creek's potential interference with tributary flows could prejudice Inland Lakes storage rights and in consequence harm equities in Nebraska and for Nebraska appropriators. I also found that the United States should be allowed to present its case on harms to federal reclamation and wildlife interests at the Inland Lakes.

The United States offered evidence to show that the inflows of Deer Creek historically have been used in part to fill the Inland Lakes during the non-irrigation season, the storage rights at Guernsey Reservoir and Glendo Reservoir, and the irrigation requirements from Whalen to Tri-State. Wilde Aff. I ¶¶ 64, 65, Table 11. The

struction of storage capacity not then existing. Decree ¶ XIII(c); *see* 325 U.S. at 625.



United States has also introduced evidence tending to show that Deer Creek inflows are needed to meet federal reclamation project requirements in drought years. *Id.* ¶¶ 67, 68.

Wyoming concedes that Deer Creek Reservoir will result in certain depletions to the flow of the North Platte River. Wyoming Answer To Petition, Motion For Leave To File Counterclaim And Counterclaim ¶ 3(c) (Mar. 18, 1987) ("Wyoming Answer And Counterclaim"); *see* Wyoming Summary Judgment Motion at 90. Despite Wyoming's protestations to the contrary,[61] I find this issue material to the question of injury. *See* Affidavit of H. Lee Becker ¶¶ 4-6, 8 (Aug. 12, 1988) ("Becker Aff. I") attached to Nebraska's Response To Wyoming's Motion For Summary Judgment (Aug. 22, 1988) ("Nebraska's Response"); Wilde Aff. I ¶¶ 64-80. The Court retained jurisdiction precisely in case "such threat [to the water supply from the tributaries] appears and it promises to disturb the delicate balance of the river." *Nebraska v. Wyoming*, 325 U.S. at 625. At the summary judgment stage, I found that Nebraska and the United States had met their burden to show sufficient facts to be allowed to attempt to prove that Deer Creek is not soley an exempt municipal project and then to prove that operation of Deer Creek Reservoir would upset the delicate balance established by the Decree.

There are also facts that cast doubt on whether Deer Creek is exclusively an ordinary and usual municipal project. Wyoming has admitted that non-municipal uses will precede municipal uses under a broad and open-ended test of municipal needs for "the full annual

[61] *See* Wyoming Summary Judgment Motion at 91:

> Here, Wyoming has a right under the Decree to construct Deer Creek Reservoir regardless of the precise amount and timing of its depletions to the North Platte River. Any dispute about these depletions therefore is not material to this case.

yield." Purcell Aff. ¶ 4; *see* Wyoming Summary Judgment Motion at 94 n.4; Affidavit of Ann. S. Bleed (Aug. 15, 1988) ("Bleed Aff.") ¶ 6 attached to Nebraska's Response: Hearing For Summary Judgment (Nov. 18, 1988) ("Summary Judgment Tr.") at 82; Wyoming Reply Brief In Support Of Motion For Summary Judgment And Wyoming Motion To Strike Affidavits (Sept. 19, 1988) ("Wyoming Reply And Motion To Strike") at 6 ("the *primary* use of Deer Creek Reservoir allowed by its state permit is municipal use") (emphasis added). The meaning of the exemption contained in Paragraph X of the Decree and the determination whether Deer Creek fits entirely within that exemption as defined could well have an impact on the outcome of this case.

Accordingly, I found summary judgment to be inappropriate on the Deer Creek Reservoir question. Sufficient conflicting evidence is floating about to require a trial on this issue.

**C. Downstream of Tri-State Dam Issues.**

As previously indicated, the downstream of Tri-State Dam issues initially were raised in Wyoming's counterclaim. In particular, Wyoming complained that Nebraska is circumventing the Decree by (i) demanding natural flow water for diversion by irrigation canals at and above Tri-State Dam in excess of the irrigation requirements of lands entitled to water under the Decree and (ii) demanding both natural flow and storage water from sources above Tri-State Dam and bypassing or diverting it to uses below the dam that are not recognized or authorized by the Decree.[62]

While Wyoming acknowledges that her entire counterclaim is not ready for summary judgement, she requested in her summary judgment motion a partial summary

[62] Wyoming Answer And Counterclaim at 8-9.



judgment ruling in order to simplify the issues for trial. Wyoming asked for a ruling that under the Decree Nebraska's rights "are limited to use on lands irrigated by water diverted from the North Platte at or upstream of Tri-State Dam."[63] For the reasons set forth below, I have denied Wyoming's request for partial summary judgment and also Wyoming's motion for reconsideration on this issue.

Nebraska acknowledges, as she must, that the section of the North Platte below Tri-State Dam was not included in the 1945 apportionment. *Nebraska v. Wyoming*, 325 U.S. at 654-55. Nebraska initially had sought an apportionment as far downstream as Grand Island, Nebraska, but subsequently conceded that all lands east of Bridgeport, Nebraska, some sixty miles east of the Wyoming-Nebraska state line, reasonably could be satisfied out of local supplies. *Id.* at 607. Special Master Doherty and the Court concluded, however, that even the lands between Tri-State Dam and Bridgeport were "adequately supplied from return flows and other local sources," and accordingly those lands were not included in the apportionment effected by the Decree. *Id.* at 654; *see also* Doherty Report at 92.

Nebraska also admits, as she must, that the apportionment itself does not extend below Tri-State Dam. Indeed, the Court took pains to assure that relief would be available should Nebraska attempt to circumvent the Decree by securing direct flow water from above Whalen, Wyoming for the use of Nebraska water users diverting below Tri-State. In that event the Court assured the United States "application for appropriate relief may be made at the foot of the decree." *Nebraska v. Wyoming*, 325 U.S. at 629.

Despite these concessions, Nebraska insists that Wyoming is not entitled to the partial summary adjudica-

[63] Wyoming Summary Judgment Motion at 80-81.

tion she seeks concerning the downstream of Tri-State issues. It is Nebraska's position that, while there is no 1945 Decree apportionment downstream of the canals diverting at or above Tri-State Dam (including the Ramshorn Canal), Nebraska should be given the opportunity to seek redress for all injuries she may suffer that depend on the apportionment. Nebraska has yet to specify exactly what injuries she apprehends, but she nonetheless insists:

> MR. SIMMS [Nebraska]:
>
> . . . We have to be able to present to the Court the injury to all equities that rely on the apportionment, and many of those equities have developed as a result of the regimen of the river created by the apportionment.

Pasadena Transcript (May 12, 1989) ("Pasadena Tr.") at 98.

Wyoming's position also remains somewhat unclear, but in essence she asserts that the Decree affords no protection for any uses or reuses downstream in Nebraska beyond the irrigation of the very lands initially irrigated by the diversions into the canals at and above Tri-State Dam. The point is best made in the following exchange:

> MR. WOODRUFF [Wyoming]:
>
> . . .
>
> I disagree with Mr. Simms that Wyoming wants to limit Nebraska to one use. Of course, we don't want to do that. We are in a semi-arid area, and maximum benefits [sic] use, I think, operates throughout this region.
>
> But first use is fine and use of return flows to get back to the stream is fine. But those—
>
> THE COURT: . . . [B]ut showing an injury to those [uses subsequent to the first irrigation use], Wyoming would argue, affords no relief whatever under the terms of the decree.



> The only question Wyoming would allow to be asked is was the primary right to divert at the above Tri-State safeguarded.
>
> MR. WOODRUFF: You bet, Judge.

*Id.* at 101-02. In sum, Wyoming contends that any injury beyond that to the primary irrigation right would be so far as the Decree is concerned, *damnum absque injuria*.

Nebraska seeks the opportunity to demonstrate injury as a result of threats to the apportionment without the narrowing constraint that Wyoming would impose. Nebraska recognizes that it is her responsibility in an original case to prove injury, and she has undertaken to develop her injury case, which apparently will include environmental injuries as well as other injuries grounded in "the regimen of the river created by the apportionment." *Id.* at 98. The United States has made the cogent point that it is difficult to rule on the question on which Wyoming seeks a summary adjudication until Nebraska's injury claims are fully articulated.[64] I agree with the United States and for that reason have declined Wyoming's motion for partial summary adjudication in con-

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[64] Illustrative of the sorts of things that require clarification by Nebraska is whether Nebraska now claims that her apportionment under the Decree has been enhanced over time by "excess flows that have gotten past the Tri-State [D]am." Pasadena Tr. at 100. Wyoming seems to apprehend that such is exactly the position Nebraska seeks to establish. Nebraska is, however, not clear at all on that, and it would be quite reasonable of Wyoming to expect Nebraska to provide clarity when she comes forward with her claims of injury.

My summary judgment ruling on the downstream of Tri-State issues was particularly disconcerting to Colorado which had, until my ruling, played essentially a bystander role in the case. Colorado states that she saw in my ruling reasons to fear that indeed Nebraska has an eye on upstream of Whalen enhancements to her apportionment. Should Nebraska's attempted showing of injury confirm Colorado's worst fears, Colorado is, of course, free to take up an active role as a party and seek to protect her interests.

nection with her counterclaim. I do so, of course, without prejudice to future requests for summary adjudication following Nebraska's showing of injury and further briefing on these issues.

One other matter has caused confusion on the downstream of Tri-State issues. The Court denied without explanation Nebraska's motion to amend her petition to include downstream of Tri-State wildlife interests.[65] That denial has spawned wide speculation as to what was intended, ranging from the contentions by Wyoming and Basin that the denial demands a ruling in favor of Wyoming on the summary adjudication she seeks regarding her counterclaim, *see* Wyoming Reconsideration Motion at 4; Basin Electric Reconsideration Motion at 5-10, to the position taken by the Platte River Trust that the denial occurred simply because all of the downstream environmental issues were already within the scope of Nebraska's initial petition and that, therefore, granting Nebraska's requested amendment would have been superfluous. *See* Summary Judgment Tr. at 111-14. Nebraska's more measured view of the matter is that the denial had the effect of eliminating any possibility of articulating the new apportionment that she had sought in her petition to amend. The following colloquy occurred during argument on Wyoming's summary judgment motion:

> SPECIAL MASTER OLPIN: . . . As a result of the Supreme Court's denial [of Nebraska's petition to amend], do I lack jurisdiction to concern myself with the environmental issues downstream of Tri-State?
>
> MR. SIMMS: I don't think so. . . . I don't think your jurisdiction is in any way upset by the decision in that case. *I don't think you can now articulate a new apportionment for wildlife purposes*, but that certainly does not mean that you cannot recognize that those equities depend upon the apportionment and the regiment [sic] of the river created by the apportionment in this decree.

[65] *Nebraska v. Wyoming*, 108 S. Ct. 1102 (1988).



Summary Judgment Tr. at 104-05 (emphasis added). I believe Nebraska's reading is correct, but, of course, stand ready to receive any clarification that the Court may wish to offer.

For the reasons stated, however, I have simply declined to grant the summary adjudication sought by Wyoming in connection with her counterclaim. I believe it is necessary to take evidence on Nebraska's injury claims in order to determine whether those claims are cognizable under the Decree.

* * *

As noted in this report, I am moving forward with pretrial proceedings, and I anticipate submitting further reports as appropriate.

Los Angeles, California,
June 14, 1989.

OWEN OLPIN
Special Master

# APPENDICES

## APPENDIX A

### THE NORTH PLATTE PROJECT

The North Platte Project was authorized shortly after passage of the 1902 Reclamation Act. The project provides irrigation water for large areas in eastern Wyoming and western Nebraska. It furnishes a full irrigation supply to about 226,000 acres in Nebraska and Wyoming, and a supplemental supply to about 107,000 acres. Wilde Aff. I attached to Response Of The United States To Wyoming's Motion For Summary Judgment (Aug. 22, 1988) ("U.S. Response").

There are several components to the project: (1) Pathfinder Reservoir in Wyoming with a capacity of 1,016,507 acre-feet and a 1904 priority date; (2) Guernsey Reservoir, also in Wyoming, with an additional storage capacity of 45,612 acre-feet and a 1923 priority date, used both for auxiliary storage and regulation; (3) the Whalen Diversion Dam in Wyoming which diverts water into two canals, the Interstate Canal on the north side of the North Platte River, supplying water to the Pathfinder Irrigation District during the irrigation season and to the Inland Lakes for storage in the non-irrigation season, and the Fort Laramie Canal on the south side; (4) the Inland Lakes, four off-stream reservoirs in Nebraska that are supplied by the Interstate Canal: Lake Alice, Little Lake Alice, Lake Minatare and Lake Winters Creek, with a combined storage capacity of about 75,000 acre-feet; (5) a drainage system; and (6) a power plant at Guernsey Dam.

Historically, the Interstate Canal has supplied water to the Inland Lakes during part of the non-irrigation season, that is the months of October, November, and April, for storage and later use for irrigation during the irrigation season.[1] This pattern permitted Special Master Doherty in the prior proceeding to reduce the amounts of

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[1] Wilde Aff. I ¶¶ 5-9.

water to be charged against the Interstate Canal during the irrigation season. Historic operation of the Inland Lakes from 1920-87 followed this regular pattern. Wilde Aff. I ¶ 19.

There is a priority date of December 6, 1904, for both Pathfinder Reservoir [2] and the Interstate Canal,[3] constructed with Pathfinder Reservoir to carry water downstream for irrigation purposes.

Although initially developed under the engineering design for the North Platte Project for storage, the Inland Lakes have acquired other uses. By executive order of President Woodrow Wilson in 1916, the Inland Lakes were reserved "and set apart for the use of the Department of Agriculture as a preserve and breeding ground for native birds." [4] The 5,047 acre refuge, including Lake Alice, Lake Winters Creek and Lake Minatare, is currently managed to provide a winter habitat for the bald eagle and many species of migratory water fowl. Affidavit of Royce R. Huber (Aug. 8, 1988) ("Huber Aff.") ¶¶ 3, 4 attached to U.S. Response. Since 1964, the Nebraska Game and Parks Commission also has managed a fishing and recreation area at Lake Minatare. *Id.* ¶ 4. During October and November, before the canal freezes, the Bureau of Reclamation diverts sufficient water through the Interstate Canal to carry the refuge through the winter. Wilde Aff. I ¶ 75.

The United States and Nebraska have placed in the record evidence tending to show that the Inland Lakes have a priority dating back to that of the Interstate Canal (and, incidentally, of the Pathfinder Reservoir), December 6, 1904. While Wyoming has not yet adduced evidence

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[2] *Nebraska v. Wyoming*, 325 U.S. at 602; Wilde Aff. I ¶ 16.

[3] Doherty Report at 204; Wilde Aff. I ¶¶ 8, 15.

[4] Exec. Order No. 2116 (1916) (attached to Huber Aff. attached to U.S. Response.)



to the contrary,[5] Wyoming has indicated her wish and intent to do so. Summary Judgment Tr. at 46-49. The United States and Nebraska also have put into the record convincing evidence of potential injury to establish equities if the claimed 1904 priority were to be impaired or changed.[6] Indeed, the evidence placed into the record by

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[5] Wyoming's evidence to this point shows only that, in recent years, Wyoming has protested the absence of an official, separate priority for storage in the Inland Lakes under Wyoming law. *See e.g.*, Fassett Aff. ¶¶ 3-6 attached to Wyoming Summary Judgment Motion. The "purpose of Wyoming's lawsuit [in federal district court] is to define the United States' right to divert natural flow to storage in the Inland Lakes." Wyoming Reply And Motion To Strike at 34. Wyoming contends that "it's clear that although the Inland Lakes are federal reservoirs and were mentioned by the Master at one point or another in his report and by the Court in its opinion, the Inland Lakes were not provided protection until the decree. They were certainly not afforded a priority equal to Pathfinder Reservoir." Summary Judgment Tr. at 46. The Special Master and Mr. Cook (Wyoming) had the following exchange:

> MR. COOK: . . . The question that we have asked, can Wyoming proceed to a judicial determination of the Inland Lakes water right, and we need to have that to be able to administer the rights of the North Platte for both the Bureau of Reclamation and any other Wyoming appropriator on that river.
>
> SPECIAL MASTER OLPIN: Mr. Cook, are you suggesting there was chaos before this discovery in the 1980's?
>
> MR. COOK: There has been chaos as a result of it, and this lawsuit is the culmination of many, many years of efforts to come to grips with this question of the Inland Lakes, and as I suggest, Wyoming will be put to its proof at some point and will maintain the burden at that time.
>
> This is a problem that Wyoming has perceived from the 1920's, quite frankly, and has made well known to the United States and since the 1945 decree has made known to the State of Nebraska.

*Id.* at 49. Wyoming apparently did not raise the issue in the earlier litigation.

[6] *See* Wilde Aff. I ¶¶ 44, 45, Table 4, ¶ 47, Table 5, ¶¶ 48-51, Table 6, Table 7, ¶¶ 73-82, 89(c) and (d).

Nebraska and the United States strongly suggests that the Inland Lakes are an integral element of the concept and engineering design of the Interstate Canal. Therefore, it arguably has never been necessary to define an independent priority for the Inland Lakes.

Wyoming has conceded that the Inland Lakes are part of the North Platte Project and that the United States has the right to move water stored initially in either the Pathfinder or Guernsey Reservoirs down to the Inland Lakes for restorage in the Inland Lakes. *Id.* at 44. In the earlier proceedings there appeared to be no controversy over the manner the Inland Lakes would be employed. Wyoming fully acknowledged their role:

> This defendant admits that in addition to the Pathfinder and Guernsey Reservoirs, the North Platte Project includes Lake Minatare and Lake Alice, storage reservoirs with capacities, respectively of 60,000 and 11,000 acre feet; that both said reservoirs are supplied through the Interstate Canal and are the only reservoirs of substantial capacities in the State of Nebraska heretofore constructed and used for the purpose of storing the waters of the North Platte and the Platte rivers in said state.

Answer Of Wyoming To Colorado Cross-Bill at 7; *see also Nebraska v. Wyoming*, 325 U.S. at 594-95 ("The Project also includes two small reservoirs in Nebraska—Lake Alice and Lake Minatare." Also, the Interstate Canal is part of the "North Platte Project."); Doherty Report at 30. However, Wyoming now contends "that as part of the North Platte project, they [the Inland Lakes] have not retained a right to store water on their own initially stored from the flows of the North Platte River." Summary Judgment Tr. at 44.

As Nebraska pointed out, the resolution of this question hinges on whether the evidence ultimately adduced will support Nebraska's interpretation that the Inland Lakes "have been administered as part of the North



Platte project with the priority of 1904," *id.* at 73, as a matter of history, of engineering design, of the functional operation of the North Platte Project over many years, and of the practical construction of the Decree.[7] "Since April 1913, the natural flow of the North Platte River has been diverted through the Interstate Canal during the non-irrigation season to the Inland Lakes for later use. . . ." Wilde Aff. I ¶ 19. Indeed, the Inland Lakes apparently were so administered as part of the North Platte Project without comment until the minutes of the Natural Flow and Ownership meeting held in Wyoming on April 9, 1985, the first record evidence of the problem raised by Wyoming.[8] Wyoming, however, has professed a willingness to offer additional evidence in this proceeding and will have the opportunity to do so.[9]

During the prior proceedings, Colorado, Wyoming, Nebraska and the United States litigated the use and requirements of the Inland Lakes. *See, e.g.*, Record at 208,

[7] *See, e.g.*, Wilde Aff. I ¶¶ 15, 16; Second Affidavit of David G. Wilde ¶ 5 and attached exhibits (excerpt from History of the North Platte Project, Nebraska—Wyoming (1913)) (Jan. 23, 1989) ("Wilde Aff. II") attached to U.S. Response; Nebraska's Response at 57-58; Summary Judgment Tr. at 136-37.

[8] Wilde Aff. I ¶ 30 ("Since then, the storage accounting procedures reflect that no agreement has been reached as to storage in or for the account of the Inland Lakes.")

[9] SPECIAL MASTER OLPIN: . . . [D]on't you hope I agree it ought to go back to the Wyoming District Court?

MR. COOK: That's the point. I guess the point is I want a trial on the question, present my evidence—

SPECIAL MASTER OLPIN: Would you rather have that trial to be in the Wyoming District Court?

MR. COOK: I will have it here. I have no problem with that. . . . [W]e'll present evidence to the contrary at the proper time.

Summary Judgment Tr. at 162-63.

Later, Mr. Cook added that the Special Master should "pick a place and we'll be there." *Id.* at 165.

480-81, 1182, 26151-53, 26227-28, 26760-83. Because the Inland Lakes hold water for use during the irrigation season on Nebraska lands, and because they are not operated by Nebraska, they were a significant issue at trial. *Id.* The Inland Lakes usefully served to reduce the flow requirements of the Interstate Canal necessary during the high demand season and that concept was therefore courted by Wyoming and Colorado. Both states tried to maximize the quantity of water to be stored in the Inland Lakes during the rainy season for later irrigation use by drawing on non-irrigation season flows in order to reduce the demand of the Interstate Canal during the irrigation season. Record at 26755-83; Doherty Report at 60-61. Specifically, Wyoming and Colorado claimed that the Inland Lakes should be allocated 73,000 acre feet of water capacity. Doherty Report at 60-61. Nebraska countered with a suggestion of 36,700 acre feet, a number much closer to the historical mean. *Id.* at 60. The Master ultimately settled on 46,000 acre feet. *Id.* at 61. Wyoming Exceptions To The Report Of The Special Master, Number VI, p. 5.

Special Master Doherty recognized that the Inland Lakes were an integral part of the Interstate Canal, and, significantly, deducted from the overall Interstate Canal requirement the 46,000 acre feet he recommended be charged against Lake Alice and Lake Minatare, underscoring the integral relationship between the Interstate Canal and the Inland Lakes. He stated:

> During the months of October, November, and April, the Interstate Canal diverts at Whalen and transports to the inland reservoirs in Nebraska—Lake Alice and Minatare—variable quantities of water which are released in the following irrigation season for use on the lands of the Pathfinder Irrigation District. *Such storage water reduces the irrigation season demand of the canal on the river at Whalen.* . . . My conclusion is that 46,000 acre feet should be adopted as the charge against the Interstate seasonal



> requirement for water storable in Lake Alice and Minatare. *This deducted from the total Interstate requirement* of 419,000 acre feet leaves a net seasonal requirement of that canal at Whalen of 373,000 acre feet, and reduces the total net seasonal requirement of all canals diverting in the Whalen—Tri-State Dam section to 1,027,000 acre feet.

Doherty Report at 60-61 (emphasis added) (footnote omitted).[10] Further, Special Master Doherty recommended that, "[s]hould it be found in the future that a dependable winter supply of more than 46,000 acre feet is divertable to Alice and Minatare, the seasonal demand on the river of Interstate should be accordingly reduced." *Id.* at 61 n.3.[11]

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[10] It is important to note, that in calculating the Interstate Canal's demand during 1931-40, Special Master Doherty emphasized that the calculation included flows to the Alice and Minatare reservoirs. Doherty Report at 76, Table VII. Moreover, despite the fact that the record contains obvious conflicts in the basic specifications of the Inland Lakes, *compare* U.S. Exhibit 132 (listing three lakes, with Minatare constructed in 1915) *with* Doherty Report at 30 (two lakes, Minatare completed in 1914), these conflicts were not examined seriously by the parties or Special Master Doherty, lending additional support to the conclusion that the sole real Inland Lakes issue was the extent of their putative supply to the overall North Platte Project scheme.

[11] *See also* General Statement at 1 attached as Exhibit A to Wilde Aff. I ("It is proposed to store all the unappropriated waters of the North Platte River, and application is made for all such unappropriated water, which, however, may be taken direct from the river at the headgates of any of the canals constructed by the Government of the United States . . . or may be stored, as appears to the best interests and of the greatest benefit to said reservoir canals and the users of water thereunder."); *id.* at 2 ("It is expected to construct numerous small reservoirs along the lines of the several canals, in order to meet the demand for large amounts of water during the short period of maximum use. These reservoirs have not been definitely located."); Affidavit of Robert Green (Aug. 17, 1988); ("Green Aff.") ¶ 6 attached to U.S. Response ("The Inland Lakes and supporting diversions, canals, and dams were constructed

Wyoming now needs to counter this rather compelling evidence.

Should a 1904 priority be proven, Wyoming insists that it would then be necessary to establish the other detailed characteristics of the water right in order to enable Wyoming to administer the right along with other Wyoming water rights.[12] The point made is a persuasive one to which Nebraska and the United States likely will ultimately be obliged to respond.

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by the Bureau of Reclamation as off-stream reregulating reservoirs to serve irrigated lands in Nebraska. As part of the North Platte Project, water has been diverted from the North Platte River since 1909 by the Whalen Diversion Dam . . . into the Interstate Canal, and . . . to the Inland Lakes . . . . The delivery of water prior to the irrigation season is necessary since the canal's capacity is not sufficient to meet irrigation demands during the peak usage months of July and August.").

[12] *See* Pasadena Tr. at 14.



## APPENDIX B

## GRAYROCKS

Grayrocks Reservoir was completed on the Laramie River in 1980 pursuant to Wyoming permits. It has an April 23, 1979, Wyoming priority to store 104,109.6 acre-feet of water from the Laramie. Grayrocks supplies the Laramie River Station, a large coal-fired steam electric power generating plant. Both the reservoir and the power plant were constructed by the Missouri Basin Power Project, a consortium of consumer and publicly owned utilities suppling power in eight states, including Nebraska and Wyoming. *Amicus* Basin Electric operates the power plant and reservoir.[13]

In 1978, Nebraska joined a lawsuit filed by environmental interests in the United States District Court in Nebraska challenging loan guarantees by the Rural Electrification Administration and issuance of a dredge and fill permit by the Army Corps of Engineers. The parties to that suit sought an injunction against construction of the reservoir and power plant on grounds of noncompliance with the National Environmenal Policy Act of 1969 and the Endangered Species Act of 1973. Following the United States District Court's grant of injunctive relief,[14] and while the case was pending on appeal to the United States Court of Appeals for the Eighth Circuit, the parties entered an Agreement of Settlement and Compromise dated December 4, 1978 ("Settlement Agreement") (attached to Wyoming Summary Judgment Motion). Nebraska and Basin Electric signed the Settlement Agreement but Wyoming, as a non-party to that suit, did not.

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[13] *See* Memorandum In Support Of Motion Of Basin Electric Power Cooperative For Leave To Intervene at 3 (Apr. 13, 1987); Summary Judgment Tr. at 52-53.

[14] *Nebraska v. Rural Electrification Admin.*, 12 Env't Rep. (BNA) 1156 (D. Neb. 1978).

The Settlement Agreement limited the "maximum annual consumptive use by the power plant at the Laramie River Station . . . to 23,250 acre-feet per year," [15] specified the order of the utilization of water for the project,[16] limited water intake structures in design and implementation for project purposes,[17] called for the measurement of releases and flows from Grayrocks Reservoir,[18] established a trust to set up *amicus*, The Platte River Whooping Crane Habitat Maintenance Trust, and ensured compliance with the Endangered Species Act of 1973, as amended.[19] Nebraska's objections to the loan guarantees and dredge and fill permit were thereupon withdrawn.[20]

In her brief opposing Nebraska's motion for leave to file the petition, Wyoming argued that, even if Nebraska does have some rights to Laramie waters, it is "estopped to now claim that construction or operation of Grayrocks Reservoir consistent with the settlement agreement violates its rights." [21] Wyoming, however, while affirming her intent to administer waters released from the Grayrocks Reservoir in compliance with Wyoming law, has not guaranteed unequivocally that this will be done in accordance with the Settlement Agreement:

> Wyoming has stated, and reiterates here, that it has administered, and will in the future administer, the water rights for Grayrocks Reservoir according to Wyoming law. . . .

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[15] Settlement Agreement at A-24.

[16] *Id.*

[17] *Id.* at A-25.

[18] *Id.* at A-25, A-26.

[19] *Id.* at A-28, A-29.

[20] *Id.* at A-29.

[21] Wyoming Opposition Br. at 17; *see also* Wyoming Summary Judgment Motion at 86-87.



> Nebraska's argument implies that there is a direct conflict between Wyoming law and the provisions of the Settlement Agreement. Wyoming disagrees, but even assuming such a conflict exists, Wyoming water officials are not free to ignore Wyoming law.[22]

Thus, although Basin Electric has agreed to maintain the minimum flows in accordance with the Settlement Agreement, Wyoming has left herself room to take the positions that the Grayrocks water rights do not include these minimum flows and that she may deplete Laramie flows notwithstanding the Settlement Agreement.[23]

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[22] Wyoming Summary Judgment Motion at 87-88; *see also* Fassett Aff. ¶¶ 7, 8.

[23] Wyoming Summary Judgment Motion at 88 ("The Decree has nothing to do with the Grayrocks Reservoir or the Settlement Agreement. The Decree expressly does not affect the Laramie River and it leaves Wyoming free to administer Laramie River water rights as her law requires."); *see also* U.S. Response at 26.

## APPENDIX C

### THE CORN CREEK PROJECT

The Corn Creek Project, planned but not yet constructed,[24] would be located in Goshen County, Wyoming, above the confluence of the Laramie and North Platte Rivers. The proposed project includes a surface water diversion system, a pump station at the confluence, an offstream storage reservoir, and a pipeline distribution system. It is intended to irrigate lands currently used for dryland farming and grazing. The primary sources of water supply for Corn Creek would be storage water from the Glendo Reservoir on the North Platte and storage water from Grayrocks Reservoir on the Laramie, "with additional supplies contemplated from the natural flows of the Laramie River." U.S. Response at 27; *see also* Wyoming Opposition Br. at 7-8; Affidavit of Stanley K. Hathaway (Aug. 24, 1987) ("Hathaway Aff.") attached to the Wyoming Summary Judgment Motion ¶ 3; Wilde Aff. I ¶¶ 62, 63.

Nebraska objected to the petition for the formation of Corn Creek Irrigation District,[25] and the Wyoming District Court gratuitously in response opined that Nebraska "has no right to the waters in the Laramie River under the authority of the cases of *Wyoming v. Colorado* . . . [and] *Nebraska v. Wyoming*." Exhibit C to the Affidavit of Dorothy W. Fritz (Aug. 20, 1987) ("Fritz Aff."). Wyoming argues that Nebraska is bound by this prior state court judicial determination of a decade ago of the meaning of the Court's Laramie Decree. That state court judgment was not appealed. Wyoming Summary Judgment Motion at 88-89; Wyoming Opposition Br. at 8-9.

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[24] Wilde Aff. I ¶ 62; Fassett Aff. ¶¶ 9-11; U.S. Response at 27.

[25] *See generally* Nebraska's Objection To Petition For Formation Of Irrigation District ("Nebraska's Objection"), reprinted as Exhibit B to Affidavit of Dorothy W. Fritz (Aug. 20, 1987) ("Fritz Aff.") attached to Wyoming Summary Judgment Motion.



I found that collateral estoppel principles did not apply for several reasons. First, collateral estoppel applies only to a "right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction." *Montana v. United States*, 440 U.S. 147, 153 (1979). Issues which need not have been adjudicated in the first proceeding are not directly determined for purposes of the second proceeding.[26] The state court was asked to decide only whether there was "enough water available in the Laramie River . . . to meet the total requirements . . . of the project and the proposed irrigation district."[27] The Corn Creek project represented only a fraction of the Laramie's total flow; the state court's sweeping *dictum* regarding apportionment of the entire river, therefore, does not estop Nebraska from raising the Laramie issues that she has raised here.[28]

Even a disposition of part of the Laramie waters between Nebraska and Wyoming would leave open questions. This is because the state court decision applied only to the parties before that court and not to *others*

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[26] *See North Carolina R.R. v. Story*, 268 U.S. 288, 294 (1925); *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 44-45 (2d Cir. 1986), *cert. denied*, 480 U.S. 948 (1987).

[27] Nebraska's Objection To Petition For Formation Of Irrigation District at 52 (Dec. 29, 1977) ("Nebraska's Objection"), reprinted as Exhibit B to Fritz Aff.

[28] *See North Carolina R.R.*, 268 U.S. at 294; *Gelb*, 798 F.2d at 44-45; *see also Norton v. Larney*, 266 U.S. 511, 515-16 (1925). Indeed, the pleadings indicate that the parties did not urge such a broad resolution. *See* Nebraska's Objection at 50-52 (focusing only on the Corn Creek waters; no demand for entire Laramie); Petition For Formation Of Irrigation District (Nov. 17, 1977) at 39, reprinted as Exhibit A to Fritz Aff. attached to Wyoming Summary Judgment Motion ("Your Petitioners desire to provide for the irrigation of approximately fifteen thousand acres . . . ."); *id.* at 40-41 (requesting only 33,100 total acre feet of water).

involved in this original action who were not before the Wyoming state court, such as the United States and Colorado. Because these other equities merit consideration, any Wyoming "victory" in state court merely raises rather than retires Laramies fact issues.[29]

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[29] Even if the record insufficiently demonstrates that the state court had before it only a fraction of the Laramie, such uncertainty only raises more fact questions inviting testimony regarding the issues actually joined in that case. Restatement (Second) of Judgments ¶ 27 Comment (g) (1982). Further, if the state court purported to allocate the entire Laramie, it clearly exceeded its jurisdiction. An issue resolved by a Court acting beyond its jurisdiction has no collateral estoppel effect. *See Montana v. United States*, 440 U.S. at 153; *Arizona v. California*, 460 U.S. 605, 619 (1983). A state "cannot be its own ultimate judge in a controversy with a sister state." *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951). Therefore, the state court lacked the authority to determine the Laramie's fate beyond the 33,100 acre feet actually at issue in that case.